IN THE SUPREME COURT
STATE OF MISSOURI

State of Missouri ex rel. RUTH CAMPBELL, Et al.,	)	
Appellants,	)	No. SC94339
Vs.	)	
COUNTY COMMISION OF FRANKLIN COUNTY, and UNION ELECTRIC COMPANY, D/B/A AMEREN MISSOURI, Respondent,	)	

Appeal from the Circuit Court of Franklin County
The Honorable Robert D. Schollmeyer, Judge

SUBSTITUTE BRIEF OF RESPONDENT FRANKLIN COUNTY

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JURISDICTIONAL STATEMENT

Jurisdiction is proper in this court by virtue of Article V, Section 3 of the Missouri Constitution and Rule 83.02 of the Missouri Rules of Civil Procedure.

STATEMENT OF FACTS

The history of this case is lengthy and the record before this Court is vast. From a general perspective, this started with "proposed amendments" to the Franklin County Unified Land Use Regulations (hereinafter "zoning regulations") submitted by the Franklin County Planning and Zoning Department to the Franklin County Planning and Zoning Commission. The "proposed amendments" were introduced at the December 14, 2010 Public Hearing as Exhibit D to the case file. R.16, the briefs of both Appellant and Ameren contain lengthy recitals of the facts and history of this case. The chronology is not in dispute nor is the procedural history.

The facts which Franklin County believes are crucial to the resolution of this matter are:

1. Prior to the adoption of the amendments which are the subject of this appeal, Franklin County had no regulations which addressed either utility waste landfills (UWL) or non-utility waste landfills (NUWL). R. 19, P22 (Vol. 1).

2. The process to amend the "zoning regulations" was commenced in May, 2010 by the Planning and Zoning Department submitting to the Franklin County Planning and Zoning Commission proposed landfill zoning amendments to address both UWL and NUWL.

3. The Franklin County Planning and Zoning Commission held public hearings on the "proposed amendments" On July 6 and July 20, 2010, at which both Appellant and Ameren participated.

4. The Franklin County Planning and Zoning Department forwarded the proposed amendments with its recommendations to the Franklin County Commission as required by Missouri law Section 64.875 RSMo. The proposed amendments were thereafter made a part of the record in this matter. R.16 (Vol.1)[1]

5. The Franklin County Commission held public hearings on the proposed amendments on December 14, 2010 and February 8, 2011. Appellants Petition, ¶ 62, 90 and 96.

6. At the public hearings held by the Franklin County Commission some 4700 pages of exhibits were received into the record and over 80 people testified.

7. On October 25, 2011, the Franklin County Commission adopted the amendments to the "zoning regulations" which are before this Court. R.19 (Vol. 1)[2].

8. On November 23, 2011 the Appellants filed their Petition for Writ of Certiorari with the Writ being issued directing Franklin County to produce the record of the proceedings. R. 55-56 (Vol. 1).

9. On April 18, 2012, Ameren and County filed a Motion for Appointment of Referee to take additional evidence. R. 7 (1). Appellants not only opposed the Motion, at no time did Appellants make any request or take any action to supplement the record.

[1]The Original proposed amendments are on Attachment 1 to Exhibit A.

[2]The regulations as adopted are reflected as Attachment 3 to Exhibit A.

10. The Circuit dismissed Counts I and III-VI of Appellant's Petition. R. 8 (Vol.1).

11. On January 11, 2013, almost two (2) years after the process to amend the "zoning regulations" was initiated, the Court entered Judgment on Count II in favor of the Respondents. R.4725 (Vol. 25).

The Appellant's significant allegations were:

1. The existing disposal ponds at the Ameren facility of a history of leakage. R. 22-23 (Vol.1).

2. Individuals who own property in the vicinity of the Ameren facility are concerned that the groundwater will be contaminated. R. 15-18 (Vol. 1).

3. Concerns were expressed that Ameren's proposed UWL would be in contact with the groundwater. R. 2263, 2290 (Vol. 13).

4. The use of Ameren's land would undermine efforts to improve the business district of Labadie, Missouri. R. 793-803 (Vol. 5).

5. The location of the UWL at the Ameren, Labadie site would adversely impact the road which runs through downtown Labadie. R. 801 (Vol.5).

In addition to the above stated procedural facts and claims made by Appellants, it is also true that at no time prior to the zoning regulations being adopted did Ameren or anyone on its behalf submit any general application, site plans, construction plans, applications for building permits, land disturbance permits or any other similar application. The reason therefore is that prior to the adoption of the "zoning regulations" by the Franklin County Commission there were no regulations. Appellant's brief, P. 11.

There were a number of technical documents and a great deal of technical testimony submitted to and received into evidence by the Franklin County Commission. What was not presented at any of the hearings were the results of specific tests which showed that the groundwater or wells in the area of the existing facility were or are contaminated.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DISMISSING COUNT I OF APPELLANT'S PETITION BECAUSE THE FRANKLIN COUNTY COMMISSION CONDUCTED A HEARING THAT WAS FAIR AND PROPER AND IN ACCORDANCE WITH MISSOURI LAW.

A. Standard of Review

With respect to the dismissal of count I by the Circuit Court, the appellate court's review is with regard to the actions taken by the County Commission. The appellate court reviews the actions de novo. City of Lake St. Louis v City of O'Fallon, 324 S.W. 2d 756 (Mo.banc 2010).

B. Conduct of Hearing

The crux of the issue before this Court is "what constitutes a fair public hearing". The County agrees with the assertion of Appellants that "no Missouri case addresses the precise question" of what constitutes a proper hearing. Appellant's Substitute Brief at 31.

All of the cases cited by Appellants deal with other factual situations which are clearly different than what is present here. State ex rel. Freeze v. City of Cape Girardeau, 734 S.W.2d 890 (Mo. App. 1987), involved a situation wherein the City of Louisiana, Missouri

gave less than the fifteen (15) days notice mandated by law. The case of Yost v Fulton County, 348 S.E.2d 638 (Ga. 1986) involved what appeared to be a scheme wherein persons who attended were not offered the opportunity at all to testify, which certainly is not true in the matter before this court. Appellants also rely upon the case of State ex re. Swofford v Randall, 236 S.W.2d 354 (Mo. App. 1950). In Swofford the record disclosed that "no sworn testimony was offered, either by realtors or by protesting property owners", at 356. Appellants rely on the wording in the Swofford opinion which states "all parties were not permitted to offer evidence and make full statements without interruption", at 356, as the basis of their claim that the hearing held in the present matter not being a valid public hearing. The Swofford is easily distinguished from the matter at hand. The Swofford case was an "informal proceeding" with no sworn testimony presented. Swofford at.

It is true that efforts were made at the outset of the hearing to exclude testimony about Ameren's application or Ameren's proposal. The reasons therefore were and are simple; there was no application or proposal before Franklin County. The Franklin County Commission did not attempt to stop anyone from testifying about the overall impact that fly ash or other residuals may have an groundwater or drinking water, no one was prevented from testifying about problems which may arise if UWL were permitted in floodway, no one was prevented from testifying about perceived dangers of located a UWL in an earthquake hazard zone. R.2354 (Vol.13). No one was prevented from presenting testimony of perceived dangers of locating a UWL in a floodway. R.4305 (Vol. 23). The initial restrictions were designed solely to prevent testimony about an application which did not

exist. As illustrated by the vastness of the record, the attempts to prohibit reference to plans or applications which did not exist were quickly abandoned.

The true test of whether or not people were allowed to speak their minds is to compare the original proposed amendment with what was actually adopted by the Franklin County Commission. The original proposal consisted of two (2) pages covering both UWL and NUWL. Attachment 1 to Exhibit A. The amendment that was ultimately adopted contained six and one half (6 ½) pages and addressed most, if not all, of the concerns raised at the hearings by witnesses in support of Appellant. For example:

- Witnesses expressed concern with the potential impact on roads through downtown Labadie. The adopted amendments require alternative access.
- Witnesses expressed concern over receipt of coal ash from other facilities. The adopted amendments preclude coal ash from being brought in from other sites.
- Witnesses expressed concern over future scientific knowledge and that, if allowed, the facility would be "grandfathered". The adopted amendments addressed this by requiring that any UWL be built in "cells" and that additional cells could not be built until existing cells were at capacity. There is also a provision that any "cells" constructed after new regulations are enacted would be subject to the new requirements.
- Witnesses expressed concern about the bottom of a UWL coming into contact with groundwater. This concern was addressed in the adopted amendments by the inclusion of the requirements from the proposed federal regulations that the

bottom of the liner had to be at least two feet above the natural groundwater level.

- Concerns were expressed regarding trucks transporting fly ash out of the UWL for other recognized purposes would spread fly ash through the air. The adopted regulations included provisions whereby all the trucks had to be covered and that a washing facility for trucks must be included on site.
- Concerns were expressed regarding contamination of drinking water. The adopted amendments establish the position of Independent registered Professional engineer (IRPE). The IRPE would be hired by and would report directly to the County during the design phase, the construction phase and throughout operation of the UWL.

It is obvious that not only were witnesses permitted to testify about their concerns; the County listened to their concerns and adopted provisions in effort to address such concerns. It cannot be seriously argued that the county failed to comply with the requirements of sections 64.875 and 64.815 RSMo. and with the County's own regulations with regard to the conduct of the hearing.

An underlying issue which has surfaced through this process was raised by the Court of Appeals in its decision, that being what exactly is required in order to have a "public hearing" under Missouri law. In the decision Judge Lisa S. Van Amburg stated that: "Missouri Courts have yet to define the exact contours of a valid public hearing for purposes of adopting a zoning amendment" at pg. 8. It is the position of

Franklin County that trying to determine the contours or parameters of a valid public hearing would lead the courts down a slippery slope. There are many different types of public hearings which governmental units of all types must hold. If the courts are going to direct what a County must do regarding zoning amendments why not dictate what a school district must do regarding a public hearing to set its tax rate? Judge Gary M. Gaertner was correct in his dissent wherein he cautioned that:

> We enter dangerous territory as it relates to our
>
> Constitutional doctrine of separation of powers
>
> If we stray beyond confirming the minimum
>
> Requirements of fairness…

To use this case as a means of allowing courts the power to direct the specifics of how all public hearings must be held would be a travesty.

II. THE CIRCUIT COURT DID NOT ERR IN UPHOLDING THE FRANKLIN COUNTY COMMISSION'S DECISION TO ADOPT THE ZONING REGULATION AMENDMENTS INVOLVING UTILITY WASTE LANDFILLS IN THAT THE DECISION TO DO SO WAS A LEGISLATIVE DECISION WHICH PROMOTES THE HEALTH, SAFETY AND WELFARE OF THE CITIZENS OF FRANKLIN COUNTY.

A. **Standard of Review**

The parties to this action agree that the decision of the Franklin County

Commission to adopt the "zoning regulation" was a legislative decision. Appellant's Brief at 43. Missouri law has long held that ordinances or orders involving zoning regulations are legislative decisions. Gash v Lafayette County, 245 S.W.3rd 229 (Mo., 2008). The law in Missouri is also very clear in that a County's legislative decisions are presumed to be valid. Vatterott v City of Florissant, 462 S.W.2d 711 (Mo. 1971), any such legislative decision may only be reversed if it is found that the decision was arbitrary and unreasonable. Summit Ridge Development Co. v City of Independence, 821 S.W.2d 516. This is known as the "fairly debatable" test and is the test which must be applied in this matter.

B. **Purpose of Regulations**

No one can seriously doubt that maintaining the Labadie plant in operation is in the public interest since there was a finding of such by the PSC. R. 2070-2071 (Vol. 12). The storage of waste, specifically coal ash, is a necessary part of a coal powered, generating plant. At the present time the storage requirement is provided by the use of ponds. One of the major concerns of some who are opposed to the regulations is that the existing ponds are leaking. R.324-325 (Vol. 2), thereby contaminating the groundwater. If nothing else, the regulations would promote the health and safety of the County by allowing the existing liquid ponds to be removed from service.

Although at times "common sense" is not so common, common sense dictates that the State of Missouri, Franklin County and all of the businesses, schools, industries and residents will continue to have the need for electricity. The record

shows that the plant at Labadie is the largest power generating plant in the St. Louis metropolitan area. R. 2218 (Vol.12). The Franklin County Commission exercised proper judgment and common sense by realizing that it is in the best interest of everyone involved to eliminate leachate from leaking from the existing liquid storage ponds as soon as possible and to develop and adopt regulations which incorporate many of the safe guards which are contained in the proposed federal regulations. 40 C.F.R. Parts 257, 261, 264, 265, 268, 271 and 302 (proposed EPA rules). What happens if no new storage facilities are authorized before the existing ponds are full? Does Ameren then shut down the Labadie plant? Do they continue to use the existing ponds and try somehow to manage the overflow? Or does Ameren simply say that it has the authority under StopAquila.org v Aquila, Inc., 180 S.W.3rd 24 (Mo. App. 2005) to bypass and ignore Franklin County's regulation. That would be the greatest travesty because all residents in the area and in Franklin County would lose the protections and safeguards Franklin County incorporated into its "zoning regulations".

It is also a fact that the Labadie plant is a major employer and tax payer in Franklin County. R. 603 (Vol. 4). The plant cannot operate without a way to store the coal ash. If there is no place or means to store the coal ash, the plant cannot operate, thereby causing drastic impact to Franklin County's economy and the loss of many jobs.

There was a great deal of testimony from both the Appellants and Ameren regarding the properties of coal ash. Appellants contend that coal ash is dangerous

per se whereas Ameren's experts testified that the proposed land use was reasonable and logical, R. 2223-2238 (Vol. 12), and that coal ash stored in accordance with the adopted regulations would not pose a risk to public health. R. 2054-2058, 2090-2105, 261-291 (Vol. 12). Both sides of the technical arguments are presented in detail in the respective drafts of the Appellants and Ameren. Having competing testimony constitutes grounds for a finding that the evidence was "fairly debatable".

CONCLUSION

It is evident that the County Commission of Franklin County took its duty of holding a public hearing on the proposed zoning amendments seriously as shown by the amount of time devoted to the hearings and the size of the transcript. The County Commission exercised its power and authority to enact what is arguably some of the most stringent UWL regulations in the Country.

There was competing testimony and evidence throughout the hearing which the commission considered when it made its decision. The decision of the Franklin County Commission was fairly debatable and was based upon substantial evidence that the amendments benefit the public health and welfare.

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that this Respondents Brief includes the information required by Rule 55.03 and complies with the limitations contained in rule 84.06(b).

Relying on the word count feature of Microsoft Word 2010, the undersigned certifies that the total number of words contained in the brief, exclusive of the cover, certificate of compliance and service, signature block, and appendix is 2,674.

The undersigned hereby certifies that an electronic copy of the above Substitute Brief of Respondent Franklin County, together with the accompanying Appendix to Franklin County's Substitute Brief, was served by e-filing on this 17th day of October, 2014 to counsel for Appellants.

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